RECORD AND BRIEF

No. 15-1204

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DAVID JENNINGS, et al.,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE FOR AMERICANS FOR IMMIGRANT JUSTICE, ET AL. IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amici curiae are 58 community groups, immigrant rights organizations, law clinics, and legal service providers whose members and clients face the severe consequences of prolonged detention without bond hearings.[1] We have a profound interest in ensuring that the voices of our members and clients are included in the resolution of this case. As explained below, their stories are not outliers. Rather, they are emblematic of an unjust system where access to constitutionally adequate bond hearings is far too arbitrary.

Detailed statements of interest for each organization are appended after the conclusion of this brief.

SUMMARY OF ARGUMENT

Each year, hundreds of thousands of people undergo a complex administrative process to determine whether they will be deported or permitted to remain in the United States. Roughly half of all asylum seekers and noncitizens placed in removal proceedings

[1] Amici state that no counsel for a party authored any part of this brief, and no person or entity other than amici and their counsel made a monetary contribution to the preparation or submission of this brief. Both petitioners and respondents have consented to the filing of this brief pursuant to Rule 37.3(a).

are permitted to remain.[2] Longtime lawful permanent residents receive cancellation of removal; fathers, mothers, and children fleeing persecution receive asylum; cases are terminated in light of legal errors. Decisions *not* to deport are a critical part of the fairness of the removal process. Such decisions carry out Congress's intent to maintain family unity and offer humanitarian relief through our nation's immigration laws.

The Government argues that detention is designed to facilitate the removal process. *See* Gov't Br. 33. But when detention extends from weeks to months to years without meaningful review, such detention perverts the removal process, both by punishing immigrants who will ultimately remain in the U.S. with their families, and by coercing immigrants with strong cases to forego their claims. Procedures short of bond hearings, and reliance on ad-hoc litigation, are insufficient to protect against these harms. Rather, as the stories and data discussed below demonstrate, this Court should ensure that individuals in prolonged

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[2] Of the nearly 200,000 immigration court cases completed in FY 2015, 53.6% of cases resulted in an outcome favorable to the noncitizen, including termination, administrative closure, or the grant of relief in the case. *See* Transactional Records Access Clearinghouse, Syracuse Univ., *U.S. Deportation Outcomes by Charge*, http://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php. Immigration courts granted 48.3% of the over 17,000 asylum applications decided in FY 2015. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, ASYLUM STATISTICS FY 2011-2015 (2016), https://www.justice.gov/eoir/file/asylum-statistics/download.

detention have access to constitutionally adequate bond hearings.

ARGUMENT

I. Prolonged Detention Without A Bond Hearing Has Perverse And Arbitrary Effects On The Immigration System, Noncitizens, And Their Families.

Prolonged detention has a devastating impact on our community members and clients, and the immigration system as a whole. First, prolonged detention without a bond hearing arbitrarily punishes immigrants, many of whom will ultimately remain in the U.S. with their families. It converts brief administrative detention into an indeterminate sentence, bearing all of the direct and collateral consequences of punishment. Second, prolonged detention without a bond hearing distorts the proper functioning of the removal system. It has an adverse, coercive impact on immigrants who need time to pursue their eligibility to remain in the United States, forcing the very individuals with the strongest cases to endure the worst of the detention system or forego their claims.

A. Prolonged detention without a bond hearing arbitrarily punishes noncitizens and their families.

For many, prolonged detention is indistinguishable from an indeterminate prison sentence. An individual in prolonged detention passes months and years behind bars, in a prison jumpsuit, shackled during visitation and court; is subjected to surveillance, strip searches, and solitary confinement; and is referred to by a number.[3] A majority of immigrants placed in removal proceedings are held in county jails, subject to the same rules and conditions as people currently serving sentences for recent criminal offenses.[4] Other facilities, including those holding arriving asylum seekers at the border, are run by the same private prison companies whose poor track records on prison conditions recently led the U.S. Department of Justice to announce that it would reduce and ultimately end its

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[3] *See, e.g.*, AMNESTY INTERNATIONAL, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA (2009), http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf; NAT'L IMMIGRANT JUSTICE CENTER, HEARTLAND ALLIANCE & PHYSICIANS FOR HUMAN RIGHTS, INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRANT DETENTION (2012), http://static.prisonpolicy.org/scans/Invisible.pdf; HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM – A TWO-YEAR REVIEW (2011), http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf.

[4] *End ICE's Overreliance on Unjust Immigration Detention*, NAT'L IMMIGRANT JUST. CTR., http://immigrantjustice.org/end-ices-overreliance-unjust-immigration-detention (providing breakdown of ICE detention centers at "List of Detention Centers (April 2016)").

use of private prisons to hold people accused or convicted of crimes in the Bureau of Prisons.[5]

Prolonged detention thus leads to all of the direct and collateral consequences associated with punishment. It causes longtime separation from loved ones, often across state lines with limitations on visitation and communication; the placement of children in foster care; job loss and education disruption; and the loss of savings and property, including one's home or business.[6] For an individual who will ultimately remain in the U.S., it is hard to understand what purpose prolonged detention serves, if not to punish.

For example, decorated Gulf War veteran **Warren Hilarion Joseph**[7] faced over three years in immigration detention before he won his case to remain in the U.S. and ultimately became a U.S. citizen:

> Mr. Joseph came to the United States as a lawful permanent resident from Trinidad, enlisting in the U.S. Army when he was twenty-one. He served in combat positions in the First

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[5] Memorandum from Sally Q. Yates, Deputy Att'y Gen., to the Acting Director, Bureau of Prisons, Reducing Our Use of Private Prisons (Aug. 18, 2016), https://www.justice.gov/opa/file/886311/download.

[6] *See supra* note 3 (listing reports describing conditions and consequences of immigration detention).

[7] The facts of Mr. Joseph's case are detailed in his habeas petition and declaration. *See* Petition for Writ of Habeas Corpus, *Joseph v. Aviles*, No. 2:07-cv-02392-JLL (D.N.J. May 11, 2007); Decl. of Warren Hilarion Joseph (on file with counsel).

Gulf War, was injured in the line of duty, received commendations for his valiant service and his rescue of fellow soldiers, and was honorably discharged.

Like many other combat veterans, Mr. Joseph fell upon hard times after returning home. In 2001, Mr. Joseph was arrested for unlawfully purchasing a handgun for individuals to whom he owed money. He received a probation sentence, and with the support of his family was able to find a good job. When he moved to his mother's house and failed to inform his probation officer, however, Mr. Joseph was found guilty of violating probation and was sentenced to six months.

Little did Mr. Joseph realize that after his six-month criminal sentence was over, he would then spend three and a half years – seven times the length of his sentence – in Hudson County Correctional Facility, in Kearney, New Jersey. He vividly recalls spending his first night in immigration detention sleeping on a concrete floor before a bed was available, pressing his injured foot into the cold ground to numb the pain, wondering when he would ever get out. His wartime injury worsened over years in the jail, until he had to be hospitalized for surgery, making it difficult for him to walk.

The indignities of the jail and the uncertainty of whether he would ever be released made detention almost too much to bear. Suffering

> from post-traumatic distress disorder, Mr. Joseph felt insecure and targeted in the jail. He was deeply pained to be separated from his U.S. citizen children and family members. His mother and sister were forced to travel across state lines to see him, though the jail sometimes turned them away.
>
> Mr. Joseph was ultimately granted a form of relief called "cancellation of removal" in light of his positive equities and ties to the community, allowing him to retain his lawful permanent resident status. He recently became a U.S. citizen, and remains proud of the work he and other veterans have done to protect this country. But he will never get back the three and a half years of his life he lost to prolonged detention.

Similarly, the two-and-a-half-year period **Astrid Morataya**[8] spent in detention carried all the punitive effects of an indeterminate criminal sentence:

> A longtime lawful permanent resident, Ms. Morataya has lived in the United States since she was eight years old, after fleeing violence in Guatemala. The mother of three U.S. citizen children, Ms. Morataya was placed in removal proceedings in 2013 on the basis of a 1999 low-level drug distribution conviction for which she was sentenced to probation. She received her conviction more than a decade

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[8] The facts of Ms. Morataya's case are detailed in a declaration by her attorney. *See* Decl. of Claudia Valenzuela, Esq. of the National Immigrant Justice Center (on file with counsel).

prior to her removal proceedings, during a period in her life when she was the victim of ongoing sexual abuse, including a violent kidnapping and rape.

Ms. Morataya ultimately testified against her abuser in court, aiding in his successful prosecution. When she was placed in removal proceedings years later, she was eligible for a "U visa" based on her cooperation with law enforcement and an "inadmissibility waiver" due to her strong positive equities. She was ultimately granted this relief, and remains in the U.S. with her family to this day.

For the entirety of the two-and-a-half years it took to resolve her removal case, however, Ms. Morataya was detained at the McHenry County Jail in Woodstock, Illinois and Kenosha County Correctional Center in Kenosha, Wisconsin. Guards treated her as an inmate, and punished her as one. She was twice placed in solitary confinement, once for having a sugar packet in her uniform that she forgot to dispose of at mealtime, and once for not being ready to leave her cell because she had begun menstruating and lagged behind her cellmates while trying to secure menstrual pads.

The years of Ms. Morataya's detention also weighed heavily on her family. She missed birthdays, holidays, her youngest daughter's first day of kindergarten, and her son's high school graduation. Worst of all, she was forced to stand by when her youngest child, at five

> years of age, became the subject of a protracted and traumatic custody battle due to her detention.

The harms of prolonged detention have also been felt by asylum seekers like **Emannuel Boukari**,[9] who fled persecution and torture only to be detained for years before ultimately receiving protection from deportation:

> A young pro-democracy activist in Togo, Mr. Boukari initially came to the U.S. as a student and was subsequently deported. Upon his deportation, Mr. Boukari was detained and tortured by government forces for nearly a year before fleeing to a refugee camp in a neighboring country. He lived in the refugee camp for approximately six years until finding a job working for a local pastor and his congregation. When men in uniform appeared at the parish looking for him, Mr. Boukari collected the documents necessary to travel back to the U.S., where he had family.
>
> Once here, he asked for protection at the border. Instead, he was placed into removal proceedings, labeled an "arriving alien," and detained in Elizabeth Detention Facility, run by private prison corporation Corrections Corporation of America. Cut off from the outside

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[9] "Emmanual Boukari" is a pseudonym to protect Mr. Boukari's identity in light of the persecution he has faced. The facts of Mr. Boukari's case are detailed in a declaration by his attorney. *See* Decl. of Alexandra Goncalves-Pena, Esq. of American Friends Service Committee (on file with counsel).

> world, Mr. Boukari was re-traumatized, forced to re-live his experience of being detained in Togo. He applied for and was denied humanitarian parole[10] three times – despite his strong case, proof of identity, and family ties to the country.
>
> After two-and-a-half years of detention, Mr. Boukari was granted withholding of removal. Now living with family in Nebraska, Mr. Boukari struggles to overcome the trauma he faced.

People like Mr. Joseph, Ms. Morataya, and Mr. Boukari are not unique within our immigration system. For removal cases that are not resolved quickly, it is not uncommon for administrative proceedings to last years, and for individuals to win their cases.

At least two sources of data confirm this. First is the data in *Jennings v. Rodriguez* itself. *Rodriguez* class members – individuals who have been detained for at least 180 days while their removal proceedings remain pending – spent an average of 404 days in detention pursuing their cases.[11] Ninety-seven percent of 235(b) subclass members pursued asylum, and two thirds won.[12] Seventy percent of 236(c) subclass members pursued applications for relief from removal that would avoid the entry of a removal order, and won their

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[10] *See* Point II.B, *infra*.

[11] J.A. 71-73, tbls. 2 & 3.

[12] J.A. 98, tbl. 28.

cases at a rate of more than five times higher than immigrant detainees generally.[13]

Second is the data from the New York Immigrant Family Unity Project (NYIFUP), reporting the outcome and characteristics of individuals subject to prolonged detention who received bond hearings under *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015). The first public defender system for detained immigrants in the United States, NYIFUP ensures representation for indigent immigrants whose cases are heard at Varick Immigration Court in New York City.[14]

According to an analysis of *Lora* bond hearings for NYIFUP clients conducted in a nine-month period, individuals who received *Lora* bond hearings – i.e., individuals whose mandatory detention had exceeded or was approaching six months – were detained an average of 320 days.[15] While the *Lora* decision is too recent for removal case outcomes to be known, based on available data, 66% of individuals who received *Lora* bond hearings pursued discretionary relief from

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[13] J.A. 95-96, 135, tbls. 23, 25-26, 38.

[14] *See New York Immigrant Family Unity Project*, BRONX DEFENDERS, http://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project/.

[15] *See* Vera Institute of Justice, Analysis of *Lora* Bond Data: New York Immigrant Family Unity Project (NYIFUP) 1 (Oct. 14, 2016), http://www.law.nyu.edu/sites/default/files/upload_documents/Vera%20Institute_Lora%20Bond%20Analysis_Oct%20%202016.pdf.

removal, withholding, or protection under Convention Against Torture.[16]

Thus, for many of our community members and clients, "civil immigration detention" is a cruel misnomer. The prolonged nature of their detention without a bond hearing turned brief, administrative detention into lengthy, punitive incarceration.

B. Prolonged detention without a bond hearing distorts the proper functioning of the immigration system.

The Government's repeated references to our community members and clients as "arriving and criminal aliens" prone to engage in "dilatory tactics" would have one believe that prolonged detention is the fault of dangerous noncitizens seeking to delay their inevitable deportation through the pursuit of various, often weak, claims. Gov't Br. 11, 24, 40-42.

Actual data and detainee experiences, as discussed above, paint a very different picture. They show that many prolonged detainees are longtime residents and asylum seekers with strong claims and ties to the community who simply seek their day in court.[17] Prolonged detention without a bond hearing forces many

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[16] *Id.*

[17] Of the NYIFUP clients who received *Lora* bond hearings, 69% are lawful permanent residents, and at least 79% have a spouse and/or children in the U.S. *See id.* at 4. *Lora* bond hearing recipients have lived in the U.S. for an average of twenty-two years. *Id.* at 3. In *Rodriguez*, the Ninth Circuit similarly noted

of these individuals to give up their valid claims in order to regain their freedom.

Consider the story of **Arnold Giammarco**,[18] an Army veteran and lawful permanent resident who agreed to his own deportation because of the terrible impact of detention:

> Mr. Giammarco was a lawful permanent resident from Italy who arrived in the United States when he was four years old and had lived with his family in Connecticut for approximately fifty years before being detained by immigration officials. Mr. Giammarco served nearly seven years in the U.S. Army and the Connecticut National Guard, achieving the rank of Sergeant, and was honorably discharged. He applied for naturalization while a service-member but his application was never adjudicated. After his military service and a divorce, Mr. Giammarco suffered emotional difficulties, struggled with drug addiction, and spent nights in homeless shelters.
>
> Yet following a series of petty offenses and drug possession convictions, Mr. Giammarco

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that many *Rodriguez* class members had significant ties to the community, including permanent residency and U.S. family members. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1072 (9th Cir. 2015).

[18] The facts of Mr. Giammarco's story are detailed in Complaint, *Giammarco v. Beers*, No. 3:13-cv-01670-VLB (D. Conn. Nov. 12, 2013), https://www.law.yale.edu/system/files/documents/pdf/Clinics/vlsc_giammarco_complaint.pdf/. *See also* Decl. of Sharon Giammarco (on file with counsel).

rebuilt his life. He began working at McDonalds and was promoted several times, becoming a nighttime production manager. He married his U.S. citizen partner Sharon, and supported her efforts to become an addiction counselor. Together they had a daughter. Mr. Giammarco worked nights, took care of his daughter during the day, and often spent weekends visiting his parents and siblings.

In the spring of 2011, nearly seven years after his last removable conviction, armed immigration agents detained Mr. Giammarco for removal proceedings. As his detention stretched from weeks to months, it had a devastating impact on his family. Without her husband's income, Sharon was forced to work seventy hours a week and move in with her sister. Mr. Giammarco's mother liquidated her savings to pay for legal fees. Though the jail's Chief of Immigration Services described Mr. Giammarco as a "model detainee," on visits Sharon and their daughter were separated from Mr. Giammarco by a glass partition. During his daughter's formative moments of life, he was unable to hold her.

After eighteen months, the anguish of imprisonment forced Mr. Giammarco to accept deportation to Italy. Years later, a district court judge ruled that his naturalization petition remains valid, and his family and community continue to fight for his return home to the U.S. Had he received a bond hearing after six months of detention, his military service, rehabilitation, and community ties could have

> been considered as factors meriting his release. Instead, he was forced to choose between his freedom and the possibility of winning his case.

Juan Santos,[19] a labor trafficking victim, gave up on his case after initially winning before an Immigration Judge because he could not bear continued detention:

> A victim of labor trafficking, Mr. Santos worked as a migrant farmworker for an agricultural enterprise in Florida under conditions of modern-day slavery. Beaten and periodically locked in a box truck, Mr. Santos testified against his traffickers in federal court. With his testimony, federal officials successfully prosecuted his employers for labor trafficking.
>
> After Mr. Santos testified, however, immigration officials detained him and charged him with removability on the basis of several minor convictions he received during and in the aftermath of the labor trafficking. More than six months passed before an immigration judge granted Mr. Santos withholding of removal based on evidence he would be persecuted if deported to Mexico, where some of the powerful individuals he testified against had significant ties.

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[19] "Juan Santos" is a pseudonym to protect Mr. Santos's identity in light of his persecution-based claim. The facts of Mr. Santos's case are detailed in a declaration by his attorney. *See* Decl. of Karen Winston, Esq. (on file with counsel).

> But immigration officials then appealed the decision, and the Board of Immigration Appeals ("B.I.A.") remanded the case. On remand, the immigration judge denied Mr. Santos's application. Mr. Santos filed an appeal based on strong claims of error, but after more than a year of detention at Baker County Jail in Florida, ultimately decided that he could not bear to remain detained. He withdrew his appeal and agreed to his deportation.
>
> Mr. Santos was later awarded a damages judgment from a civil labor trafficking lawsuit, but because his counsel could not locate him after his removal to Mexico, he never received his award.

The story of **Brayan Fernandez**[20] also highlights the negative impact of prolonged detention on individuals who have strong claims to remain in the U.S.:

> Mr. Fernandez is a lawful permanent resident from Mexico who was detained and placed into removal proceedings in 2015, several years after two convictions stemming from a robbery offense for which he had been arrested when he was a young man. By the time he was detained, Mr. Fernandez had changed his life, had a stable job, and was supporting his family. Mr. Fernandez was eligible for relief from removal through an "adjustment

[20] "Brayan Fernandez" is a pseudonym to protect his family's privacy. The facts of Mr. Fernandez's case are detailed in a declaration by his attorney. *See* Decl. of Paige Austin, Esq. of the Bronx Defenders (on file with counsel).

of status" application and inadmissibility waiver, which first required the federal government to approve an "I-130" visa petition by his U.S. citizen wife, recognizing their family relationship as a basis for adjustment.

The process dragged on, however, for months. Detention separated him from his wife, who was pregnant, and his two young U.S. citizen children. After he missed the birth of his son, Mr. Fernandez grew disheartened and depressed. His wife attended all of his court appearances and hoped that the case would move more quickly. When, seven months into his detention, Mr. Fernandez accepted a deportation order rather than remain detained, his wife ran from the courtroom in tears. Mr. Fernandez was deported in November 2015. His I-130 visa petition was approved one month later.

Prolonged detention has an adverse, coercive impact on the immigration system as a whole. Individuals like Mr. Giammarco, Mr. Santos, and Mr. Fernandez had strong claims to remain in the U.S. But the length and indeterminate nature of their detention short-circuited the process.

II. Current Administrative Procedures Fail To Protect Noncitizens From Unreasonable Deprivations Of Liberty Caused By Prolonged Detention Without A Bond Hearing.

The flawed administrative procedures currently available to some detainees – "*Joseph* hearings" and humanitarian parole – fall far short of the process individuals in prolonged detention would receive through a bond hearing. Neither a *Joseph* hearing nor humanitarian parole offers a meaningful way to challenge prolonged detention because neither involves a hearing on flight risk and dangerousness before a neutral decisionmaker.

A. *Joseph* hearings fail to prevent the prolonged detention of individuals with meritorious immigration cases.

A *Joseph* hearing is not a bond hearing. It does not address flight risk or dangerousness. Instead, it is a hearing in which a detainee may present legal arguments that she is not properly included in the mandatory detention statute. *In re Joseph*, 22 I. & N. Dec. 799, 806 (B.I.A. 1999). To prevail at a *Joseph* hearing, an individual must establish that the government "is substantially unlikely to establish the charge of deportability" at issue. *Id.* Under this extraordinary burden, the vast majority of *Joseph* hearings are resolved in favor of the government. *See* Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the* Joseph *Standard in Mandatory Detention Custody*

Hearings, 26 GEO. IMMIGR. L.J. 65, 72 (2011) (finding that nearly ninety percent of *Joseph* hearing appeals result in continued detention); *see also Tijani v. Willis*, 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J., concurring) (*Joseph* standard "not only places the burden on the defendant . . . it makes that burden all but insurmountable").

The case of **Sayed Omargharib**[21] illustrates how a *Joseph* hearing fails to protect meritorious litigants from years of mandatory detention:

> Mr. Omargharib was a lawful permanent resident for twenty-eight years and a successful hairdresser in Washington, D.C. for over ten years when he was detained. He was charged as a removable "aggravated felon" due to a larceny conviction for taking two pool cues following a dispute with an opponent in a local pool league. Mr. Omargharib served no jail time for his conviction. But he spent nearly two years in immigration detention before he was released and his removal case was terminated.
>
> After five months of detention, the immigration court finally held a *Joseph* hearing for Mr. Omargharib, but rejected his arguments that his conviction was not an aggravated felony under correct application of the law and ordered his deportation.

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[21] The facts of Mr. Omargharib's case are specified in *Omargharib v. Holder*, 775 F.3d 192 (4th Cir. 2014). *See also* Decl. of Steffanie Lewis, Esq. (on file with counsel).

> In 2014, the U.S. Court of Appeals for the Fourth Circuit ultimately agreed with the argument Mr. Omargharib had advanced at his *Joseph* hearing nearly two years prior, holding that his conviction was not an aggravated felony. That decision confirmed that Mr. Omargharib had never been deportable – or detainable – at all.
>
> Upon his release Mr. Omargharib had lost both his home and means of supporting himself. Unable to satisfy business expenses and child support while detained and unemployed, his credit was destroyed. He missed his son's high school graduation and the two became estranged. In Mr. Omargharib's prolonged absence from the community, his clientele left permanently for other salons and he was unable to replace them. Now homeless, Mr. Omargharib is temporarily sleeping in a friend's basement in Virginia. He still plans on applying for citizenship within the year.

The over three-year detention of **Lorenzo Carrillo**,[22] meanwhile, shows how *Joseph* hearings do not even offer *U.S. citizens* protection from prolonged mandatory detention:

> Mr. Carrillo became a lawful permanent resident after being brought to the United States at seven years old. Growing up in California,

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[22] "Lorenzo Carrillo" is a pseudonym to protect Mr. Carrillo's privacy. The facts of Mr. Carrillo's case are detailed in a declaration by his attorney. *See* Decl. of Holly Cooper, Esq. of the University of California Davis School of Law Immigration Law Clinic (on file with counsel).

he made close friends with his classmates and cared for his younger brother while his parents worked. When he was seventeen years old, his mother naturalized, automatically making him a U.S. citizen.

In 2006, Mr. Carrillo was erroneously detained and placed into removal proceedings for a firearm possession conviction. He filed two *Joseph* motions, presenting evidence of his claim to U.S. citizenship. Each time, the Immigration Judge rejected his arguments, even consolidating his decision on the second *Joseph* motion with his order of removal.

After three years of detention, a federal district court recognized that Mr. Carrillo was indeed a U.S. citizen. Only then did immigration authorities release him. His two *Joseph* hearings were meaningless to him.

B. The arbitrary exercise of parole authority fails to prevent the prolonged detention of asylum seekers and lawful permanent residents.

Humanitarian parole is no replacement for a bond hearing. It offers no access to a neutral decisionmaker and is plagued by inconsistent administration.

Humanitarian parole decisions are made by various, dispersed agents within the U.S. Department of Homeland Security, the same agency that detains and pursues removal against noncitizens in the first place. When exercising this power, each immigration agent

makes a judicially unreviewable decision as to "whose continued detention is not in the public interest" based on her own interpretation of that interest. 8 C.F.R. § 212.5(b)(5). In theory, parole is favored for certain groups, including asylum seekers who pass a credible fear interview. *See* U.S. IMMIGRATION AND CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE 6 (2009), https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf. In practice, however, parole determinations are much more arbitrary.

Data shows, for example, that parole grants for asylum seekers who passed a credible fear interview have dramatically decreased from eighty percent in 2012 to forty-seven percent in 2015. HUMAN RIGHTS FIRST, LIFELINE ON LOCKDOWN: INCREASED U.S. DETENTION OF ASYLUM SEEKERS 13 (2016), http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown_0.pdf. Those figures are consistent with a national survey of attorneys working in immigration detention centers conducted in 2016, which found that ninety percent reported denials of parole when eligibility criteria had been established. *Id.* at 14. Such statistics refute the government's unsupported claim that asylum seekers who pass a credible fear interview are "ordinarily released" on parole. Gov't Br. 14.

The stories below illustrate how parole fails to protect asylum seekers and lawful permanent residents with meritorious claims for relief from prolonged detention:

"Starting at age 17, **Ahilan Nadarajah**[23] was repeatedly tortured in Sri Lanka." *Nadarajah v. Gonzales*, 443 F.3d 1069, 1071 (9th Cir. 2006). After arriving to the United States in search of asylum, he endured almost four and a half years of mandatory detention before winning his claim. Now a U.S. citizen, his requests for parole were repeatedly rejected.

Targeted as a member of a minority ethnic group in Sri Lanka, Mr. Nadarajah fled brutal beatings inflicted by the Sri Lankan army. He sought protection from the U.S. in 2001 but was detained as an "arriving alien." ICE initially offered to parole Mr. Nadarajah out of detention on a $20,000 bond. Because he could not pay the bond, Mr. Nadarajah requested that it be lowered on three separate occasions. Each request was denied, and the parole offer was eventually rescinded without notice.

A year and a half into his mandatory detention, Mr. Nadarajah's case was first heard before an immigration judge. Twice, Mr. Nadarajah was granted asylum; twice, the government appealed. After his second asylum grant, Mr. Nadarajah presented two more requests for parole, both denied.

He then filed a habeas petition in the District Court for the Southern District of California. Mr. Nadarajah was finally ordered released by

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[23] The facts of Mr. Nadarajah's case are described in *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006). *See also* Decl. of Ahilan Arulanatham, Esq. of the American Civil Liberties Union of Southern California (on file with counsel).

> the Ninth Circuit in March 2006, four years and five months after his placement in mandatory detention. The Court of Appeals found that ICE had abused its discretion by denying parole for reasons that were neither facially legitimate nor bona fide, based on facially implausible evidence. Today, Mr. Nadarajah is a U.S. citizen.

The story of **Maria Alvarez**,[24] illustrates how parole is arbitrarily refused to similarly situated individuals:

> Mrs. Alvarez fled Mexico with her husband, son, and daughter after a criminal organization began extorting the family for "protection money" – a promise not to harm them as long as they continued to pay. When Mrs. Alvarez's husband lost his job, the family missed a payment and her son and daughter were beaten. Aware that state authorities worked in collaboration with the criminal organization, all four family members sought asylum by presenting themselves at the U.S. border.
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> Immigration officers separated them, sending Mrs. Alvarez's husband, son, and daughter to different detention centers in California and detaining Mrs. Alvarez alone in Arizona. All three of Mrs. Alvarez's family members were then released and relocated to Virginia to live

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[24] "Maria Alvarez" is a pseudonym to protect Mrs. Alvarez's identity in light of her persecution-based claims. The facts of her case are detailed in a declaration by an attorney familiar with the case. *See* Decl. of Laura St. John, Esq. of the Florence Immigrant and Refugee Rights Project (on file with counsel).

with family members. Yet despite the substantially similar bases for each family member's asylum claims, Mrs. Alvarez alone remained in detention, her two parole requests denied.

Mrs. Alvarez's first parole request included letters from a U.S. citizen family member pledging a fixed residence for her, evidence of her husband's kidney disease and her role as his primary caregiver, and evidence of Mrs. Alvarez's own cardiac and hypertension medical problems, supported by a professional medical evaluation. Her second request included letters detailing how her health had deteriorated in detention, a letter from her husband's doctor attesting to his worsening medical condition without Mrs. Alvarez's care, a letter from the immigration lawyer representing Mrs. Alvarez's family in Virginia, committing to also represent Mrs. Alvarez if she were released, and letters from Mrs. Alvarez's family documenting the hardship her detention had placed on them.

Because Mrs. Alvarez was detained in the Ninth Circuit, she eventually received a *Rodriguez* bond hearing. The presiding judge found that she was neither a flight risk nor danger to the community and released her on bond. Mrs. Alvarez awaits her asylum hearing in Virginia.

Mr. Nadarajah and Mrs. Alvarez both came to the U.S. seeking our protection. But asylum seekers are

not the only individuals subject to arbitrary detention under laws that apply to "arriving aliens."

The story of **Leandro Placencia de la Rosa**[25] is one of many stories of longtime lawful permanent residents[26] subjected to prolonged detention as "arriving aliens":

> Mr. Placencia became a lawful permanent resident at fourteen years old, in 1993, and has lived here ever since. His mother, two sisters, and two children are U.S. citizens, while his father and brother are also lawful permanent residents. For over ten years, Mr. Placencia worked as a taxi driver, financially supporting his children and mother, who suffers from severe arthritis.
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> After a brief trip to the Dominican Republic, Mr. Placencia was placed in removal proceedings, charged with inadmissibility based on an old drug possession conviction he had received

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[25] The details of Mr. Placencia's story are available in his Petition for Writ of Habeas Corpus, *Placencia de la Rosa v. Shanahan*, 16-cv-3301 (S.D.N.Y. May 3, 2016). *See also* Decl. of Lara Gaffar, Esq. of Make the Road New York (on file with counsel).

[26] For example, in the same district where Mr. Placencia filed his habeas, numerous other lawful permanent residents have challenged their detention as "arriving aliens" in 2016 alone. *See, e.g.*, *Cardona v. Nalls-Castillo*, 15-cv-9866, 2016 WL 1553430 (S.D.N.Y. Apr. 14, 2016); *Perez v. Aviles*, 15-cv-5089, 2016 WL 3017399 (S.D.N.Y. May 24, 2016); *Arias v. Aviles*, 15-cv-9248, 2016 WL 3906738 (S.D.N.Y. July 14, 2016); *Chen v. Shanahan*, 16-cv-841 (S.D.N.Y. Feb. 3, 2016); *Thomas v. Shanahan*, 16-cv-5401 (S.D.N.Y. July 7, 2016); *Singh v. Shanahan*, 16-cv-6142 (S.D.N.Y. Aug. 3, 2016); *Ricketts v. Simonse*, 16-cv-6662 (S.D.N.Y. Aug. 24, 2016).

as a minor. But it was not until years later, and after a second drug possession conviction, that immigration officials detained Mr. Placencia without bond in a New Jersey county jail, using his brief trip to classify him as an "arriving alien."

Proceeding pro se, Mr. Placencia was ordered removed and transferred to Etowah County Detention Center in Alabama. As his time in detention wore on, he developed depression and hypertension.

In 2016, a community organization in New York City succeeded in reopening Mr. Placencia's removal case and in transferring him back to detention in New Jersey. Due to immigration court backlogs, however, Mr. Placencia did not receive a hearing in his reopened case until March 2016. After a habeas petition was filed, immigration officials agreed to release him, and the petition was dismissed. He was subsequently granted cancellation of removal. All told, Mr. Placencia spent twenty-two months in detention as an "arriving alien."

III. Ad Hoc Litigation Fails To Address Due Process Concerns For Individuals Whose Detention Has Already Become Prolonged.

The Government supports the use of habeas litigation as a remedy for prolonged detention of "exceptional duration." Gov't Br. 31, 46-50. But lack of legal expertise and pervasive court delays would make

such a remedy illusory for the vast majority of individuals locked away in prolonged mandatory detention.

A. The majority of detained immigrants are pro se and lack the legal expertise to seek relief through federal litigation.

No right to counsel is recognized in removal proceedings, and nationally, a mere fourteen percent of immigration detainees are represented by counsel. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32 (2015). The vast majority of detained immigrants are pro se.

"With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'" *Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (quoting ELIZABETH HULL, WITHOUT JUSTICE FOR ALL 107 (1985)). "A lawyer is often the only person who could thread the labyrinth." *Id.* A pro se litigant therefore faces nearly insurmountable barriers when seeking a remedy for prolonged detention in federal courts.

Pro se habeas petitioners face government attorneys who take full advantage of complex procedural requirements to seek dismissal of their cases – before they are even heard on their merits. *See, e.g., Kholyavskiy v. Achim*, 443 F.3d 946, 949 (7th Cir. 2006) (affirming dismissal of a habeas petition for failure to

allege proper custodian); *Carmona v. Aitken*, No. 14-cv-05321-JSC, 2015 WL 1737839, at *8 (N.D. Cal. Apr. 10, 2015) (dismissing petition for failure to exhaust administrative remedies); *Zhen Yi Guo v. Napolitano*, No. 09 Civ. 3023 (PGG), 2009 WL 2840400, at *5 (S.D.N.Y. Sept. 2, 2009) (applying "immediate custodian" rule to find lack of jurisdiction).

Further, circuits that require a habeas petition to challenge prolonged detention use changing lists of factors whose satisfaction, let alone relevance, is not intuitive to the pro se petitioner. The Third Circuit, for example, inquires whether a petitioner's challenge to removal is in "good faith," essentially demanding a mini-trial on the merits of a removal case in order to win the right to a bond hearing in a custody case. *See, e.g., Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 476 (3d Cir. 2015) (describing "reliance on a contested legal theory" amongst other "real issues" as "[t]he most important consideration for us").

The over two-and-a-half-years of mandatory detention of **Horatio Gomez**,[27] a U.S. citizen, illustrate how pro se litigants are effectively cut off from meaningful relief from prolonged detention if forced to file habeas petitions:

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[27] "Horatio Gomez" is a pseudonym to protect Mr. Gomez's privacy. The facts of Mr. Gomez's case are detailed in a declaration by his attorney. *See* Decl. of Holly Cooper, Esq. of the University of California Davis School of Law Immigration Law Clinic (on file with counsel).

Mr. Gomez immigrated to the United States from Mexico as a lawful permanent resident when he was twelve years old. Mr. Gomez's mother was a United States citizen born in Arizona. When he was detained and placed in removal proceedings based on a misdemeanor marijuana possession conviction and a federal conviction for aiding and abetting in the distribution of marijuana, Mr. Gomez steadfastly argued that he was a U.S. citizen based on his mother's status.

When immigration officials denied his request for a bond hearing, he filed a pro se habeas petition in U.S. district court. The district court rejected the petition on four separate occasions because he failed to comply with procedural rules he did not know existed, including giving a complete history of his immigration case. More than a year passed before the district court finally ordered the government to respond.

One month before that order, the Ninth Circuit decided *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008), holding that detainees whose removal orders had been judicially stayed, like Mr. Gomez, were entitled to bond hearings when their detention became prolonged. Mr. Gomez promptly moved for a *Casas* hearing before the immigration judge and was released on bond. His habeas petition was dismissed as moot. In total, Mr. Gomez spent over a year in mandatory detention *after* filing his pro se petition, and two-and-a-half years altogether.

B. Ad hoc litigation often results in arbitrary denials and delays in due process.

Even those individuals who win a habeas claim face substantial delay in securing relief from prolonged mandatory detention. Given the "surge in immigration appeals and a corresponding surge in the sizes of . . . immigration dockets[,]" *Lora*, 804 F.3d at 615-16, district court review of immigration habeas petitions is frequently unreasonably prolonged itself.

Data on filing and decision dates from cases reported in Westlaw shows that delayed adjudication of habeas petitions alleging unreasonably prolonged detention under § 1226(c) is not an isolated problem confined to one judge or circuit. In the Third Circuit, subsequent to the deciding of *Diop v. ICE/Homeland Security*, 656 F.3d 221, 223 (3d Cir. 2011), which set a "reasonable" time limit on § 1226(c) detention, decisions ordering a § 1226(c) bond hearing have taken a mean of 168 days to issue, or over five-and-a-half months. In the Eleventh Circuit, subsequent to this Court's decision in *Demore v. Kim*, 538 U.S. 510 (2003), the mean decision time for a prolonged detention habeas ordering a § 1226(c) bond hearing is 578 days, nearly 19 months. In the First Circuit, that same figure is 237 days, over seven-and-a-half months. In the Sixth Circuit, the figure is 409 days, almost 14 months.[28]

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[28] The methodology and data underlying these findings is detailed in Decl. of Anthony Enriquez, Esq., of the Immigrant Defense Project (on file with counsel).

It is unjust to require detainees to endure additional months or years of detention in order to vindicate claims that their detention is already unconstitutionally prolonged. **Patrick Thaxter,**[29] a longtime lawful permanent resident, experienced that very injustice:

> Mr. Thaxter has lived in the United States since 1999 and has been a lawful permanent resident for fourteen years. The loving father to five U.S. citizen children, Mr. Thaxter worked for years as a chef at a Caribbean restaurant in Philadelphia to support his family.
>
> In 2013, Mr. Thaxter was convicted of a marijuana offense for which he received no jail time. He was subsequently detained without bond and consequently lost his job as a cook. His family was forced to move from Pennsylvania to a relative's house in Georgia after threats of eviction.
>
> After Mr. Thaxter's detention became prolonged, he filed a habeas petition seeking a bond hearing. The district court eventually granted the habeas petition – but a full 530 days after filing. It took six months alone for the district court to refer the case initially to the magistrate judge; an additional eleven months for the magistrate to issue his report and recommendation; and finally two months for the district court to adopt the magistrate's

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[29] The details of Mr. Thaxter's case are specified in *Thaxter v. Sabol*, No. 1:14-CV-02413, 2016 WL 3077351 (M.D. Pa. June 1, 2016). *See also* Decl. of Daniel Conklin, Esq. (on file with counsel).

findings. Notably, the magistrate recognized that Mr. Thaxter's detention had become prolonged by the date of initial filing.

The district court held a bond hearing, found that Mr. Thaxter was neither a flight risk nor danger to the community, and ordered him released. Mr. Thaxter continues to litigate his removal proceedings. Besides traveling to his job, Mr. Thaxter rarely leaves the house because his years in immigration detention accustomed him to confinement.

IV. The Second And Ninth Circuits' Interpretation Avoids The Serious Constitutional Concerns Caused By Prolonged Detention Without A Bond Hearing.

A. *Rodriguez* and *Lora* hearings ensure that individuals are not needlessly detained for prolonged periods.

The stories above illustrate the harms of prolonged detention and the inadequacy of alternatives short of bond hearings. Just as powerful, though, are the stories of those who have received their day in court in the Ninth and Second Circuits. These early recipients of *Rodriguez* and *Lora* bond hearings demonstrate the value of bond hearings in ensuring due process and preventing unjustified detention.

Consider the story of **Mark Hwang**,[30] a lawful permanent resident who was detained and separated from his twin daughters just after their birth:

> Mr. Hwang has been a lawful permanent resident of the U.S. for nearly thirty years, having immigrated to the U.S. from South Korea at the age of nine. In 2013, upon returning home from the hospital with his prematurely born newborn twin daughters, Mr. Hwang was arrested by immigration officials in a home raid. He now faced both deportation and mandatory detention for a marijuana conviction he received fifteen years prior. Shackled and transported to Adelanto Detention Facility, Mr. Hwang was forced to leave his U.S. citizen wife Sarah alone to care for their newborns and two-year-old son and to run their small business.
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> Detention was devastating for Mr. Hwang. He was unable to see his family for long periods. Even when they visited, he was not permitted to hold his children. He tried to have his marijuana conviction vacated, but was unable to appear at any criminal court hearings due to his detention.
>
> Finally, after six months of detention, in July 2013 Mr. Hwang was given a *Rodriguez* hearing and ordered released on a $9,000 bond. Mr. Hwang later had his marijuana

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[30] The facts of Mr. Hwang's case are detailed in a declaration by his attorney. *See* Decl. of Stacy Tolchin, Esq. (on file with counsel).

> conviction vacated, and his removal proceedings were subsequently terminated in August 2014, restoring his lawful permanent resident status.

Rodriguez hearings have similarly made all the difference to numerous asylum seekers like **Gloria Cervantes Flores**:[31]

> Growing up in Honduras, Ms. Cervantes faced serious abuse and neglect. Beaten, burned, and forced to work at the age of six years old, Ms. Cervantes experienced unspeakable trauma. As an adult, Ms. Cervantes fell in love only to experience abuse at the hands of her domestic partner. He beat and raped her, punched her in the stomach while she was pregnant, and tried to yank her baby out when she refused to get an abortion. Ms. Cervantes fled the abuse and presented herself at a U.S. port of entry. She was sent to the Mesa Verde Detention Facility in Bakersfield, California, where she passed her credible fear interview. But she was not released.
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> As the months passed, Ms. Cervantes submitted five requests for humanitarian parole, supported by a sponsor letter, financial records, identity documents, and medical documents relating to medical care she needed in detention. Each of the requests was denied,

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[31] The facts of Ms. Cervantes's case are detailed in a declaration by her attorney. *See* Decl. of Luis Angel Reyes Savalza, Esq. of Pangea Legal Services (on file with counsel).

> using boilerplate language. In December 2015, after six months of detention and with her asylum case still pending, Ms. Cervantes finally received a *Rodriguez* bond hearing, and the Immigration Judge granted release on $1,500 bond. With the help of family and friends, Ms. Cervantes's bond was posted and she was able to rejoin her family in Bakersfield, California, where she continues to reside, awaiting her upcoming immigration court hearings.

On the other side of the country, after the Second Circuit interpreted § 1226(c) to avoid constitutional concerns in *Lora v. Shanahan*, individuals like **Aba Dele**[32] also were able to secure due process:

> Mrs. Dele was born in West Africa and experienced a difficult childhood. She was twice raped and struggled to find work to support herself financially.
>
> Afraid of the violence and instability of her life in West Africa, Mrs. Dele came to the United States on a visitor's visa. In 2006, her family began to struggle financially. Facing eviction, Mrs. Dele took some money from the company that employed her to pay her rent. Soon arrested, she was sentenced to probation and restitution, which she paid back in full. Ashamed by what she had done, she rebuilt

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[32] "Aba Dele" is a pseudonym to protect Ms. Dele's privacy. The facts of Ms. Dele's case are detailed in a declaration by her attorney. *See* Decl. of Alina Das, Esq. of the Immigrant Rights Clinic of Washington Square Legal Services (on file with counsel).

her life and eventually become a home health aide for elderly individuals. She married a U.S. citizen and together they raised four children in addition to supporting other family members.

Eight years after her conviction, without any other incidents with the law, Mrs. Dele was dropping her youngest child off at his preschool when she was arrested and shackled by armed immigration agents. Mrs. Dele was detained in a county jail far from the city where she lived. Despite her eligibility for lawful permanent residence as the wife of a U.S. citizen and her role as a caretaker and breadwinner for four young children, she was subjected to mandatory detention based on her prior conviction.

Because her case was within the Second Circuit, Mrs. Dele was eligible for a *Lora* bond hearing. Throughout the long months of separation from her children, she focused desperately on the date of her bond hearing, and in October 2016 was granted a $3,000 bond. Her husband posted the bond and she was released back to her family. She continues to pursue her adjustment of status application.

Similarly, the story of **Alexander Lora**[33] -- the man whose case gave rise to prolonged detention bond

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[33] Details of Mr. Lora's story are described in *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015). *See also* Decl. of Talia Peleg, Esq. of Brooklyn Defender Services (on file with counsel).

hearings in the Second Circuit – illustrates the power of bond hearings to ensure due process:

> Alexander Lora is a lawful permanent resident from the Dominican Republic who has lived in the United States since he was seven years old. In 2014, Mr. Lora was placed into removal proceedings and detained based on a 2010 drug offense, for which he had been sentenced to probation with no jail time. His immigration detention without bond forcibly separated Mr. Lora for the first time from his family in Brooklyn. Left behind were his fiancée, his ailing mother for whom he provided care, and his then-two-year-old son, who was placed into foster care while Mr. Lora was detained.
>
> Although he was able to establish eligibility for relief from removal, his case continued for months and Mr. Lora remained detained. The grant of his habeas petition, which ultimately resulted in the Second Circuit's decision in *Lora v. Shanahan*, led to a bond hearing. At the bond hearing, the government stipulated to a bond of $5,000 and waived appeal. Since his release, Mr. Lora reunited with his family in Brooklyn, got his U.S. citizen son out of foster care, obtained gainful employment as a unionized construction worker, and married his U.S. citizen fiancée. He continues to work and provide for his family as he awaits his upcoming hearing on cancellation of removal.

Individuals like Mr. Hwang, Ms. Cervantes, Mrs. Dele, and Mr. Lora are not alone. In the Ninth Circuit,

over the course of an eighteen-month period, approximately 1680 bond hearings were held for *Rodriguez* class members.[34] Sixty-nine percent of individuals in these hearings were granted bond.[35] In the Second Circuit, in the approximately nine-month period after the court issued *Lora*, at least 158 *Lora* hearings were held for indigent noncitizens in one immigration court within the Second Circuit alone.[36] Sixty-two percent of individuals who received these *Lora* hearings were granted bond.[37]

Notably, not everyone who received a *Rodriguez* or a *Lora* bond hearing was released. Based on available data, 31% of *Rodriguez* hearings and 38% of *Lora* hearings resulted in the denial of bond.[38] The Government repeatedly conflates the provision of a bond hearing with a grant of release. The data reveals no such equivalence.

B. The procedural protections in *Rodriguez* and *Lora* hearings ensure that noncitizens are not arbitrarily deprived of their liberty.

The procedural protections in *Rodriguez* and *Lora* hearings are essential to the provision of due process.

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[34] J.A. 526.

[35] J.A. 528.

[36] Vera Institute of Justice, *supra* n. 15, at 1.

[37] *Id.*

[38] *Id.*; J.A. 528.

In these hearings, the government must justify continued detention by clear and convincing evidence. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1077 (9th Cir. 2015); *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015). Moreover, if an individual remains detained, hearings must reoccur every six months, and the length of the continuing detention must be considered at these hearings. *Rodriguez*, 804 F.3d at 1088-90.

As the story of **Sylvester Owino**[39] illustrates, these procedural protections are critical to ensuring that bond hearings are constitutionally adequate and meaningful:

> A member of a minority tribe in Kenya during a period of political unrest, Mr. Owino was arrested and tortured by Kenyan police on multiple occasions. Mr. Owino fled Kenya in 1998, securing a student visa to study in the United States, and made this country his home.
>
> Years later, battling struggles with alcohol, Mr. Owino was convicted of robbery and placed in removal proceedings. Detained by immigration officials in 2006, Mr. Owino applied for protection from removal to Kenya under the Convention Against Torture.
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> Thus began Mr. Owino's nine-year ordeal in mandatory detention. His applications both for bond and relief from removal were initially denied and it ultimately took multiple Ninth

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[39] The details of Mr. Owino's case are described in *Owino v. Holder*, 771 F.3d 527 (9th Cir. 2014). *See also* Decl. of James Fife, Esq. (on file with counsel).

Circuit decisions to correct the various errors committed by the Immigration Judge and the B.I.A.

As the years passed, Mr. Owino repeatedly sought new bond hearings, but his requests for release were denied. After the Ninth Circuit issued its decision in *Rodriguez*, Mr. Owino was transferred to a detention facility in Alabama. Community Initiatives for Visiting Immigrants in Confinement mounted a successful campaign to return him to the Ninth Circuit. Only then was Mr. Owino given another bond hearing. The Immigration Judge ultimately granted Mr. Owino release on $1,500 bond, which community members raised in less than thirty minutes. After nine years, Mr. Owino was able to regain his freedom.

People who are detained for years without a final order of removal, like Mr. Owino, are by definition succeeding in their lawful efforts to defend themselves against deportation. Periodic bond hearings, where the length of detention is considered, allow immigration judges to account for these struggles and the punitive aspects of such prolonged detention.

CONCLUSION

The stories of the community members and clients described in this brief demonstrate the harsh consequences that prolonged detention has on individuals

who lack meaningful access to constitutionally adequate bond hearings. *Amici* respectfully urge this Court to consider the unjust impact that this interpretation has on the immigrant communities we represent and uphold the decision of the Ninth Circuit in this case.

Respectfully submitted,

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APPENDIX

DESCRIPTION OF AMICI CURIAE

Americans for Immigrant Justice

Americans for Immigrant Justice ("AI Justice"), formerly Florida Immigrant Advocacy Center, is a nonprofit law firm dedicated to promoting and protecting the basic rights of immigrants. AI Justice is dedicated to advancing and defending the rights of immigrants in detention.

Black Alliance for Just Immigration

The Black Alliance for Just Immigration ("BAJI") is a national organization that organizes, advocates, and raises awareness around issues facing Black immigrants, including immigrants from Africa, the Caribbean, and elsewhere, in the United States. For over a decade BAJI has engaged Black communities to advance the interests of immigrants facing detention and deportation.

Boston College Law School Immigration Clinic

The Boston College Law School Immigration Clinic ("BC Immigration Clinic") is a clinical program of Boston College Law School. The BC Immigration Clinic regularly represents clients who are detained by the Immigration and Customs Enforcement ("ICE"); in these cases, students represent clients both in their removal proceedings and bond hearings. As such, the BC Immigration Clinic has an interest in ensuring

that more detainees are entitled to a bond hearing and that the procedures used in such bond hearings are fair and adequately protect detainees' liberty interests.

Boston University's Immigrants' Rights Clinic

Boston University's Immigrants' Rights Clinic ("IRC") is a law school clinic that provides direct representation to immigrants in removal proceedings, including individuals who face detention without bond pending removal proceedings. IRC has held legal orientation projects within immigrant detention centers and has a longstanding interest in promoting the rights of immigrants in detention.

Brandeis Human Rights Advocacy Program of the University of Louisville School of Law

The Brandeis Human Rights Advocacy Program of the University of Louisville School of Law works actively with the local community, non-profits and stakeholders in the community to advance the human rights of immigrants, refugees and noncitizens.

Bronx Defenders

Founded in 1997, the Bronx Defenders provides innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support and other civil legal services and advocacy to indigent Bronx residents. Under the New York Immigrant Family Unity Project, we represent over 330 detained

non-citizens every year and witness the adverse impact of prolonged detention on our clients, their ability to pursue legal claims to stay in this country, and their families.

Brooklyn Defender Services

Brooklyn Defender Services ("BDS") is a public defender organization that represents more than 45,000 people every year who cannot afford an attorney in criminal, family, and immigration proceedings. Since 2013, BDS has provided removal defense services through the New York Immigrant Family Unity Project, New York's first-in-the-nation appointed counsel program for detained New Yorkers facing removal who cannot afford an attorney. BDS represents Alexander Lora, the petitioner in *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015) in his removal proceedings, and represented him before the federal district court and circuit court.

Center for Community Change

The Center for Community Change ("CCC") is a national not-for-profit organization that works to empower low-income people, particularly in communities of color, to make change that improves our communities and public policy. CCC has a longstanding history of advancing and defending the rights of immigrants. CCC coordinates the Fair Immigration Reform Movement (FIRM), a network of 42 member organizations in 33 states, working to keep families together and fix

our nation's broken immigration system. As part of this work, we have encountered countless numbers of immigrant community members who have had their lives ripped apart because of prolonged detention. We have witnessed firsthand the devastating impact detention has on immigrant families.

Center for Constitutional Rights

The Center for Constitutional Rights ("CCR") is a national non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. Founded in 1966, CCR has a long history of litigating cases on behalf of those with the fewest protections and least access to legal resources, including numerous landmark civil and human rights cases fighting for racial and immigrant justice and protection from indefinite detention and solitary confinement.

Center for Gender & Refugee Studies

The Center for Gender & Refugee Studies ("CGRS") at the University of California Hastings College of the Law works to protect the fundamental human rights of asylum seekers, with a particular focus on expanding protection for women, children, and LGBT individuals. CGRS has played a central role in the development of law and policy related to asylum seekers, including on detention and enforcement issues.

Coalition for Humane Immigrant Rights of Los Angeles

The Coalition for Humane Immigrant Rights of Los Angeles ("CHIRLA") is a non-profit organization with local and state presence in California, and national recognition. Our mission is to advance the human, civil rights, and full integration of New Americans and their children into the fabric of our society.

Community Initiatives for Visiting Immigrants in Confinement

Community Initiatives for Visiting Immigrants in Confinement ("CIVIC") is the national immigration detention visitation network, which is working to end U.S. immigration detention by monitoring human rights abuses, elevating stories, building community-based alternatives to detention, and advocating for system change. CIVIC has a longstanding interest in this Court's decision and has been advocating for years against the lengthy detention of noncitizens held in pre-removal immigration detention in the United States. *See, e.g.*, Rethinking Pre-removal Immigration Detention in the United States: Lessons from Europe and Proposals for Reform, *Oxford University Press – Refugee Survey Quarterly* (2012) 31 (3):69-100, doi:10.1093/rsq/hds007, *available at* http://tinyurl.com/hds007.

Community Justice Clinic of the University at Buffalo School of Law

Community Justice Clinic of the University at Buffalo School of Law ("CJC") is a law school clinic that represents immigrants, including individuals who are subject to the mandatory detention provisions of the Immigration and Nationality Act. CJC also represents and works with immigrant-led organizations with members who have been subject to prolonged detention.

Community Legal Services in East Palo Alto

Community Legal Services in East Palo Alto ("CLSEPA") is a non-profit organization that provides legal assistance to low-income immigrants in and around East Palo Alto, California, where two-thirds of the population is Latino or Pacific Islander. The immigration team provides consultations to and represents local residents in various types of immigration benefits and proceedings, including detained and non-detained removal proceedings in immigration court.

Criminal/Immigration Defense Clinic at Colorado Law School

The Criminal/Immigration Defense Clinic at Colorado Law School is a law clinic that represents indigent clients charged with misdemeanor offenses in Boulder County, CO. We have witnessed first-hand the devastating impacts of prolonged detention on immigrants

while they pursue their ability to remain in the U.S. with their families.

Cumberland Legal Aid Clinic

The Cumberland Legal Aid Clinic, through its Refugee and Human Rights clinical program, is a law-school based clinic in which law students represent immigrants fleeing human rights abuses who wish to remain in the U.S. The clinic regularly represents immigrants who face detention and are seeking asylum, withholding of removal, protection under the Convention Against Torture, special immigrant juvenile status, protection under the Violence Against Women Act or adjustment of status. We are intimately familiar with the adverse impact prolonged detention has on an immigrant's ability to defend against removal.

Detention Watch Network

As a national coalition of organizations and individuals concerned about the impact of immigration detention on individuals and communities in the United States, Detention Watch Network ("DWN") has a substantial interest in the outcome of this litigation. Founded in 1997, DWN has worked for nearly two decades to fight abuses in detention, and to push for a drastic reduction in the reliance on detention as a tool for immigration enforcement. Since 2011, through its advocacy and organizing work, DWN has been advocating for the elimination of all laws mandating the detention of immigrants.

Dolores Street Community Services

Dolores Street Community Services ("DSCS") provides pro bono removal defense to low-income immigrants in San Francisco, CA, specializing in representing particularly vulnerable clients. DSCS clients have suffered the severe consequences of prolonged detention; some clients have accepted removal orders despite fears of persecution and other compelling claims for relief, simply because they could no longer endure detention. Other clients have experienced the incalculable benefits of an individualized custody determination, often released on their own recognizance or minimal bond after six months of unreviewed custody.

El Centro del Inmigrante

El Centro del Inmigrante is a not-for-profit organization. We have been advocating for immigrant rights for the last 10 years. We focus mainly in providing services to low income immigrant families supporting them with applications for Citizenship, DACA and other immigration benefits. Part of our efforts is to find permanent remedies for our broken immigration system. We believe that prolonged detentions without bond are serious violations of basic human rights.

Florida Coastal Immigrant and Human Rights Clinic

The Immigrant and Human Rights Clinic engages in both direct legal services to non-citizens as well as legal advocacy projects. Students represent clients in

removal proceedings in both the detained and non-detained setting and conduct know your rights presentations for detainees.

Florida Institutional Legal Services Project of Florida Legal Services

The Florida Institutional Legal Services Project of Florida Legal Services ("FILS Project") is dedicated to protecting and advancing the rights of indigent people in state and federal custody in Florida by providing high quality legal services. For years, we have engaged in monitoring, advocacy, and litigation regarding conditions of detention for immigrant detainees in Florida, including in very remote contracted county jails and at Krome, the large immigrant detention facility in Miami, Florida.

Georgia Detention Watch

Georgia Detention Watch is a coalition of organizations and individuals that advocates alongside immigrants to end the inhumane and unjust detention and law enforcement policies and practices directed against immigrant communities in our state. Our coalition includes activists, community organizers, persons of faith, lawyers, and many more.

Georgia Latino Alliance of Human Rights

The Georgia Latino Alliance for Human Rights ("GLAHR") is a statewide nonprofit organization

whose mission is to build the capacity and power of immigrant communities. For more than a decade, GLAHR has dedicated its efforts to community organizing to defend and advance the civil and human rights of immigrants regardless of their immigration status.

Grassroots Leadership

Grassroots Leadership is an Austin, Texas-based national organization that works to end prison profiteering and reduce reliance on criminalization and detention. Grassroots Leadership has long advocated for community-based alternatives to detention, particularly for vulnerable populations including asylum-seeking women and families. We have also witnessed the impact of prolonged detention on migrants and their families after they have been released from detention and as they attempt to integrate into the community.

Immigrant Defense Project

Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes. IDP provides defense attorneys, immigration attorneys, immigrants, and judges with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law.

Immigrant Justice Corps

Immigrant Justice Corps ("IJC") is the country's first immigration legal fellowship program. IJC seeks to expand access to counsel by increasing the quantity of immigration lawyers and the quality of the immigration bar. IJC's fellows regularly represent detained noncitizens and have seen the impact of long-term detention on their clients' well-being and their ability to pursue relief.

Immigrant Rights Clinic of Washington Square Legal Services, Inc.

Immigrant Rights Clinic of Washington Square Legal Services, Inc. ("IRC") is a law clinic that represents and works with immigrants and immigrant rights organizations, including individuals who face detention without bond pending removal proceedings. IRC has a longstanding interest in advancing and defending the rights of immigrants in detention.

Immigrants' Rights Clinic of Morningside Heights Legal Services, Inc.

Immigrants' Rights Clinic of Morningside Heights Legal Services, Inc. ("IRC") is a law clinic that represents immigrants, including individuals in detention. IRC is committed to advocating on behalf of and advancing the rights of immigrants in detention.

Immigration Clinic of the University of Miami School of Law

Immigration Clinic of the University of Miami School of Law is a law clinic that advocates on behalf of immigrants in a wide variety of administrative and federal court immigration proceedings and collaborates with immigrant rights groups on projects to advance the cause of social justice for immigrants. Many of the clinic's clients are detained. The clinic has challenged the lawfulness of the prolonged detention of its clients in U.S. District Court and appeared as counsel for *amici curiae* in *Sopo v. U.S. Atty Gen.*, 825 F.3d 1199 (2016).

Irish International Immigrant Center

The Irish International Immigrant Center ("IIIC") is a multi-service welcome center for immigrants of all nationalities, based in Boston, Massachusetts. Originally founded in 1989 to serve the needs of Irish immigrants in the New England area, the IIIC now annually provides immigration, education, and social services to thousands of immigrants from around the world.

Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law

The Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law ("IJC") is a law clinic that represents individuals facing deportation, as well as community-based organizations, in

both public policy and litigation efforts. IJC has a long-established interest in fighting for the rights of immigrants pursuing their ability to remain in the U.S., including representing people who face detention without bond pending removal proceedings.

LatinoJustice PRLDEF

LatinoJustice PRLDEF is a national not-for-profit civil rights legal defense fund which has defended the constitutional rights, civil rights and the equal protection of all Latinos under law. Since 1972, PRLDEF's mission has been to promote civic participation, to cultivate Latino leaders, and to promote voting rights, employment opportunity, language rights, educational access, and immigrants' rights.

Lawyers' Committee for Civil Rights of the San Francisco Bay Area

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area (LCCR) is a non-profit legal services and social justice organization that works in partnership with the private bar to protect and advance the rights and status of people of color, low-income communities, and immigrants and refugees through direct legal services, impact litigation, and policy advocacy. As part of LCCR's core commitment to protecting the rights of asylum seekers, it has a strong interest in preventing the harmful effects of prolonged detention on noncitizens and their ability to fairly defend themselves in removal proceedings.

Legal Aid Society of New York

The Legal Aid Society of New York was founded in 1876 to serve New York's immigrant community and is the nation's oldest and largest not-for-profit law firm for low-income persons. For several decades, Legal Aid has maintained an Immigration Law Unit ("ILU") within its Civil Practice. The ILU has an expertise in representing immigrants at the intersection of criminal and immigration law and has also represented, and served as amicus on behalf of, immigrants seeking release from prolonged and mandatory detention in habeas and other federal court proceedings.

Loyola University New Orleans College of Law Clinic

The Loyola University New Orleans College of Law Clinic has operated an Immigration Clinic for decades. Louisiana is home to three major immigration detention centers and has a growing population of immigrants. Our Immigration Clinic has been providing assistance to people in the Deep South outside of Louisiana as well.

Make the Road New York

Make the Road New York ("MRNY") is a nonprofit, membership-based community organization that integrates adult and youth education, legal and survival services, and community and civic engagement, in a holistic approach to help low-income New Yorkers improve their lives and neighborhoods. MRNY is at the

forefront of numerous initiatives to analyze, develop, and improve civil and human rights for immigrant communities, including issues related to detention and deportation of immigrant communities.

National Day Laborer Organizing Network

The National Day Laborer Organizing Network ("NDLON") is a national non-profit organization that works to improve the lives of day laborers and immigrant communities. NDLON advocates for the rights of people facing immigration detention, including those who have experienced prolonged detention.

National Immigration Law Center

The National Immigration Law Center ("NILC") is the primary national organization in the United States exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. Over the past 35 years, NILC has won landmark legal decisions, including *Orantes-Hernandez v. Smith*, that have sought to protect fundamental due process rights for all individuals, regardless of immigration status.

National Latina Institute for Reproductive Health

The National Latina Institute for Reproductive Health ("NLIRH") is a not-for-profit organization dedicated to advancing the health, dignity, and justice for the 28

million Latinas, their families, and their communities in the United States. NLIRH has a longstanding history of working to ensure fair treatment of women, children, and families, irrespective of legal status. As part of its work, it recognizes the direct impact immigration status has on access to reproductive health care. The deprivation of rights, family disruption, inadequate access to health care, loss of livelihood, retraumatization and abuse that are inherent to conditions of confinement, are only exacerbated through prolonged detention.

Neighborhood Defender Services of Harlem

Neighborhood Defender Services of Harlem ("NDS") is a public defense organization that represents non-citizens who are arrested in New York City. Specifically, the Immigration Practice represents non-citizens in removal proceedings, including individuals who are held in immigration detention without bond.

New York Immigration Coalition

The New York Immigration Coalition ("NYIC") is an advocacy and policy umbrella organization for more than 175 multi-ethnic, multi-racial, and multi-sector groups across the state. Through its members and its own advocacy the NYIC has long worked against unjust immigration policies, including the use of detention against immigrants.

Pangea Legal Services

Pangea Legal Services ("Pangea") is a nonprofit organization that advocates for immigrants in deportation proceedings through legal representation, community empowerment, and policy advocacy. The impact of prolonged detention for Pangea's clients is stark: it has resulted in a loss of employment, loss of custody by mothers over their minor children, traumatized children who experience loss of a parent, loss of health, reliving traumas of being held captive in detention after escaping abusive captivity abroad, eviction from the home, and homelessness by immediate relatives of detained immigrants.

Project South

Project South is a Southern-based leadership development organization that creates spaces for movement building. We work with communities pushed forward by the struggle – to strengthen leadership and to provide popular political and economic education for personal and social transformation. We build relationships with organizations and networks across the U.S. and global South to inform our local work and to engage in bottom-up movement building for social and economic justice. Our legal and advocacy work is focused on defending Muslim and immigrant communities against discrimination.

Public Counsel

Public Counsel is the nation's largest pro bono law firm based in Los Angeles, California. Founded in 1970, Public Counsel's primary goals are to: (1) protect the legal rights of disadvantaged children; (2) represent immigrant victims of torture, persecution, domestic violence, trafficking, and other crimes; and (3) foster economic justice by providing underserved communities with access to quality legal representation. In support of these goals, Public Counsel represents indigent immigrants from around the world in their claims before the United States Citizenship & Immigration Services, the Executive Office for Immigration Review, and the federal courts. These include many detainees who have suffered the adverse impact of prolonged detention.

Queens Law Associates – Public Defenders

Queens Law Associates – Public Defenders ("QLA") is a nonprofit legal service provider representing low-income individuals – some of whom are noncitizens – facing criminal charges in the criminal justice system. QLA also provides free legal services to noncitizens in their immigration matters, including representation in deportation proceedings. QLA has a direct interest in this case, as its clients may be subject to mandatory detention provisions based on convictions and may be detained by ICE for prolonged periods.

Reformed Church of Highland Park

Weekly since 2009, the Reformed Church of Highland Park has visited detainees at the Elizabeth Detention Center. We assist asylum seekers, victims of trafficking, people with final orders of deportation, and migrants without status. We support children in our congregation whose parents have been deported. We have cared for unaccompanied minors, DACA-eligible and DAPA-hopeful individuals, and immigrant victims of domestic violence. We work to reunite families. We resettle refugees through Interfaith RISE (Refugee & Immigrant Services & Empowerment), a program of our congregation's nonprofit community development agency, Churches Improving Communities.

Seton Hall University School of Law Center for Social Justice

The Seton Hall University School of Law Center for Social Justice ("CSJ") empowers law students to gain critical, hands-on experience while providing pro bono legal services for low-income residents in the region. The Center has long worked to defend the statutory, constitutional, and human rights of immigrants.

Southeast Asia Resource Action Center

The Southeast Asia Resource Action Center ("SEARAC") is a national organization that advances the interests of Cambodian, Laotian, and Vietnamese American communities who came to this country as the largest group of refugees ever resettled in the U.S.

Due to outdated immigration laws passed in 1996 mandating the automatic detention and removal of immigrants with old criminal convictions without due process, almost 16,000 community members have received final orders of deportation since 1998. Many of these individuals have been subjected to mandatory and prolonged detention, due to complex repatriation agreements between the U.S. and Southeast Asian governments. SEARAC has been an outspoken advocate in the movement to strengthen protections for all immigrants and refugees who suffer prolonged detention as a result of our broken immigration system.

Southern Poverty Law Center

The Southern Poverty Law Center ("SPLC") fights all forms of discrimination and works to protect society's most vulnerable members through litigation, education, and monitoring organizations that promote hate. The SPLC provides pro bono assistance to and advocates on behalf of immigrant detainees throughout the southern United States, including Alabama, Florida, Georgia, Louisiana, and Mississippi.

University of California Davis School of Law Immigration Law Clinic

The University of California, Davis School of Law Immigration Law Clinic ("The Clinic") is an academic institution dedicated to defending the rights of detained noncitizens in the United States. The Clinic

provides direct representation to detained immigrants who are placed in removal proceedings.

University of California, Irvine School of Law Immigrant Rights Clinic

The University of California, Irvine School of Law Immigrant Rights Clinic is a law clinic providing pro bono legal services to immigrants in removal proceedings. The Clinic also partners with community and legal advocacy organizations on policy and litigation projects to advance immigrants' rights and immigrant workers' rights. For several years, clinic students working under the supervision of faculty attorneys have represented immigrants detained at the Adelanto Detention Center and Orange County, CA facilities in their bond hearings.

University of Houston Law Center Immigration Clinic

The University of Houston Law Center Immigration Clinic advocates on behalf of immigrants in a broad range of complex legal proceedings before the immigration and federal courts and the Department of Homeland Security. The Clinic collaborates with other immigrant and human rights groups on projects that advance the cause of social justice for immigrants.

University of Maryland Carey School of Law Immigration Clinic

The University of Maryland Carey School of Law Immigration Clinic represents individuals in immigration removal proceedings, including individuals who are detained without bond. The Clinic represents individuals who are subject to mandatory detention, many of whom end up being detained for prolonged periods of time.

University of Tulsa College of Law Immigrant Rights Project

The Immigrant Rights Project is a clinical program of the University of Tulsa College of Law. The program aims to help address a significant need for legal representation and advocacy on behalf of vulnerable immigrants in our community. Clinic students and faculty have participated in a range of advocacy projects involving asylum seekers and other immigrant detainees in detention centers in Oklahoma and elsewhere.

UnLocal, Inc.

UnLocal, Inc. ("UnLocal") is an immigration legal services and community education non-profit based in New York City. UnLocal provides presentations on immigration law, know your rights trainings, and legal consultations at community-based spaces including schools, workplaces, places of worship and other immigrant-serving organizations. UnLocal clients and the membership of many of UnLocal's community-based

partners include individuals who have faced detention without bond during the pendency of their removal proceedings.

Valparaiso University Law School Immigration Clinic

The Valparaiso Immigration Clinic ("VIC") is a law clinic at Valparaiso University Law School that represents immigrants in Northwest Indiana and Chicago, including individuals who have been held in immigration detention. VIC students have also assisted with case intake for immigrant detainees, provided community outreach in Northwest Indiana concerning immigrant rights issues, and represented immigrant rights organizations that work with immigrant detainees.

Washington and Lee University School of Law Immigrant Rights Clinic

The Washington and Lee University School of Law Immigrant Rights Clinic provides free legal services to non-citizens in removal proceedings in Virginia. Many of our clients are detained in the immigrant detention facility in Farmville, VA, which is the primary detention facility in Virginia, housing between 600-700 non-citizens.

Washington Defender Association

The Washington Defender Association ("WDA") is a statewide non-profit organization whose membership is comprised of public defender agencies, indigent defenders and those who are committed to seeing improvements in indigent defense. In 1999, WDA established WDA's Immigration Project to give the Washington defense bar access to expert immigration law resources in order to effectively represent their noncitizen clients with regard to the immigration consequences at stake in their criminal cases. Detention issues are a vital part of the immigration consequence of a conviction, and can radically affect access to counsel and case outcomes.